Nos. 18887, 18888

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

IDAHO SHEET METAL WORKS, INC., A CORPORATION
APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO

REPLY BRIEF FOR APPELLANT

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Coverage Issue

1. Despite the stipulated facts showing that 86% of defendant's dollar volume of business during the years here in question consisted of fabrication, installation, maintenance and repair of manufacturing equipment designed especially for factories producing goods for interstate commerce, on which defendant's employees admittedly "during many workweeks * * * spent a substantial part of their total hours" (A31-~~33~~ 39), defendant contends that none of these employees are within the coverage of the Fair Labor Standards Act. Defendant places primary reliance on the Supreme Court's Zachry decision, apparently on the assumption, which the court below also mistakenly made (A54), that the Roland Electrical decision (on facts manifestly far more analogous to, if not indistinguishable from, the facts of the instant case) is no longer authoritative because decided prior to the 1949 Amendment to §3(j). In making

this assumption, defendant, and the court below, have simply ignored the plainly expressed legislative intent in enacting the 1949 Amendment, as well as the express recognition by the Supreme Court in Zachry itself that "illustrations of coverage," which "both reports" (Senate and House) specifically approved, were intended by Congress to remain "unchanged by the amendment" (362 U.S. at 318).

The Roland decision (as we have pointed out in our main brief, pp. 13-15) was specifically approved, by name, in the Senate Report on the 1949 Amendment to the definition of "produced," (95 Cong. Rec. 14874-75), and both the House and Senate reports expressly confirmed the Congressional intent that the amended language would continue to cover employees who, like defendant's in the present case, make, repair or maintain "machinery or tools" used in the production of goods for commerce, or who repair, maintain, improve or enlarge "equipment, or facilities of producers of goods," "whether they are employed by the producer or by an independent employer performing such work on behalf of the producer." 1/

1/ The context of these quoted statements of legislative intent demonstrates their direct pertinence to the case at bar:

> Senate Report [95 Cong. Rec. 14874-75, emphasis added]:
> Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer:
> 1. Office or white-collar workers [citing, inter alia, the Roland Electrical decision].
> 2. Employees repairing, maintaining, improving or enlarging the buildings, equipment, or facilities of producers of goods [citing Roland first, followed by Kirschbaum v. Walling, 316 U.S. 517 and other pre-1949 decisions].
> 3. Plant guards, watchmen, and other employees performing protective or custodial services for producer of goods [citing, inter alia, Walling v. Sondock, 132 F.2d 77, involving an independent watchmen service, along with Walton v. [fn. con'td. on p. 3].

2. Defendant's attempt to distinguish Roland on a factual basis is patently specious and untenable. It is noteworthy that the court below made no pretense of distinguishing the cases factually, but relied simply on the assumption that the 1949 change in statutory language and the Zachry decision superseded Roland and excluded that case and all similar "local business" from the Act's coverage (A54-55). Contrary to defendant's assertions (br. p. 7), Roland's services and supplies were no more "necessary daily or regularly to carry on the work of the interstate commerce producing employer" and were no less "local" and "intermittent" than are defendant's services and supplies. Indeed, the stipulated facts of the instant case provide even a stronger basis

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fn. 1 cont'd.

> Southern Package Corp., 320 U.S. 540, where the watchman was employed by the producer himself; as well as Walling v. Thompson, 65 F.Supp. 686 (S.D. Calif.) upholding coverage of employees of an independent firm engaged in the installation, repair and maintenance of burglar alarm systems leased to a general miscellany of customers, only 7-1/2% of whom were producers of goods for commerce].
>
> The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer.
>
> The work of employees of employers who produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities.
>
> 1. Production of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by purchaser in producing goods for interstate commerce [citing Roland along with the Amoskeog Machine Co, Amidon, and Hamner decisions, discussed in our main brief, p. 14].
>
> 2. Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate commerce [citing this Court's decision in Reynolds v. Salt River Valley Water Users Asso., [fn. cont'd. on p. 4].

for coverage during the "many weeks" in which defendant's employees "spent a substantial part of their total hours" in work for a limited number of producers --continuously during the three to four month "down period" at least--so extensive that it amounted to 86% of defendant's total dollar volume of business. In Roland, the employer had about 1000 miscellaneous active accounts, including "private [as well as] commercial, and industrial" (326 U.S. at 661) and, in contrast to the instant case, only 22% of Roland's total dollar volume of business was attributable to producers of goods for commerce, who numbered 31 of the total of 1000 customers (Roland, record, pp. 10, 12). 2/ Obviously, therefore,

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fn. 1 cont'd.

143 F.2d 863 (C.A. 9), along with several decisions upholding the coverage of employees of "local" utilities serving the general public some of whom were producers for commerce].

House Report [95 Cong. Rec. 14928-29, emphasis added]:

* * * the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (Kirschbaum v. Walling, 316 U.S. 517), or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the Act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

2/ The stipulated facts in Roland contained a breakdown of the transactions with 33 specified customers, which showed that during the ten-months period stipulated as representative, Roland did a total volume of business of $251,833, of which $53,777 was attributable to work performed for the 31 production-for-commerce customers.

Roland's services and supplies to interstate producers must have been much less extensive and more "intermittent" than defendant's in the instant case.

Like defendant here, the Roland Company argued--unsuccessfully in the Supreme Court--that it had all of the indicia of a "local" business which served the general public, describing itself as "simply the modern version of the Village Blacksmith Shop, made famous by Henry Wadsworth Longfellow," and pointing out that it held itself available for the repair of "small electric motors, electric toasters, electric irons and similar appliances" (Roland's br. in No. 45, Oct. Term 1945, pp. 4, 5, 7, 14, 29, 33-34, 43, 48). Compare defendant's description of its business as one having "a background and history of a local establishment inaugurated for the purpose of serving the local needs" (br. 11, 7) and simply the modern "evolution" from the "early tin shops, back at the turn of the Century--1900," which then were all "located in retail hardware stores" (T 71-72). The Supreme Court in Roland, ignoring the district court's characterization of Roland as a "local business" serving "local customers" for "local 'consumption'" (see 54 F.Supp. 733, at 737), held that "the work of [Roland's] employees" for the customers producing goods for commerce was within the Act's coverage because of its "close and immediate tie with the process of production" (326 U.S. at 665, emphasis supplied), and also pointed out that the Act "does not require an employee to be employed exclusively in the specified occupation" (id. at 664, emphasis the Court's). See also Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, upholding the Act's "in commerce" coverage of draftsmen and stenographers working on plans and specifications for the repair and construction of interstate facilities, notwithstanding their employment by an independent so-called "local" architectural firm serving a miscellany of customers. The Supreme Court disposed of the employer's contention "that its activities are essentially local in nature" (id. at 213, emphasis the Court's)

by pointing out that "as we stated, Congress deemed the activities of the individual employees, not the employer, the controlling factor in determining the proper application of the Act" (ibid.)--therefore "we focus on the activities of the employees and not on the business of the employer" (id. at 211).

3. Defendant's contention that its employees are not within the Act's coverage because the work for interstate producers is "irregular and intermittent" (br. pp. 5, 9, 11) and "for the most part, rendered during the time the companies * * * are in the so-called 'down period' (about three months per year)" (br. pp. 5, 9, 11) is in essence a direct contradiction of the admitted facts that its employees "during many workweeks * * * spent a substantial part of their total hours worked" in services for interstate producers, to the extent of providing 86% of defendant's income. This Court's decision in Mitchell v. Idaho Lumber Co., Inc., 223 F.2d 836 (C.A. 9), we submit, decisively controverts defendant's contention. In answer to the comparable argument there made that the company's interstate production was for a single contract--"an isolated transaction outside of the ordinary and usual course of defendant's business and operations" --this Court, referring to the well-settled rule that "the applicability of the Fair Labor Standards Act is not to be determined by the nature of the employer's business, but rather by the character of the employee's activities [citing Supreme Court decisions]," reversed the district court's decision and upheld the Act's coverage of the employees during the period they produced goods to fill the single contract. In language directly pertinent here, this Court said:

> While the transaction represented the filling of but one contract, the amount of money involved and the extensive work on the part of the employees who requested the Secretary of Labor to bring this action, plus the fact that the production and fabrication of the goods at appellee's plant covered a period of five months, convinces this Court that the amount involved was "substantial." (223 F.2d at 839).

The same reasoning applies equally here to the "many workweeks" during which the employees admittedly "spent a substantial part of their total hours" fabricating equipment for use in processing goods for commerce. The claim of coverage here, in both the §17 and the §16(c) actions, rests only on those workweeks in which admittedly a substantial part of employees' working time was so spent. Throughout the Act's more than 25 years' existence, the employees' workweek has been the standard for determining his coverage and the amounts due underpaid employees.[3/] This was the basis used to determine the amount of the claim of the employee on whose behalf the §16(c) action (Civil Action No. 3752) was brought, and which underlies the stipulation that, in the event the questions of law (on coverage and exemption) are decided in plaintiff's favor, judgment may be entered in that action for the plaintiff for "$500 plus costs" (A44, ¶9; A42-43).

3/ This has been the standard used administratively since the earliest days of the Act' application [see Interpretative Bulletin No. 5, Wage and Hour Division, United States Department of Labor, originally issued in December 1938, ¶9, 1940 Wage Hour Manual 131] and has been adopted by virtually all of the courts including this Court. As stated in Tobin v. Alstate Const. Co., 195 F.2d 577, 580 (C.A. 3, 1952), affirmed 345 U.S. 13: "* * * As long as any individual employee spends a substantial part of the work-week in commerce or in the production of goods for commerce, he is entitled to the full benefits of the Act."

See also Southern California Freight Lines v. McKeown, 148 F.2d 890 (C.A. 9), certiorari denied 326 U.S. 736, rehearing denied 326 U.S. 808; Mitchell v. Warren Oil Co., 213 F.2d 273 (C.A. 5); Skidmore v. John J. Casale, Inc., 160 F.2d 527 (C.A. 2), certiorari denied 331 U.S. 812; Atlantic Co. v. Weaver, 150 F.2d 843 (C.A. 4); Guess v. Montague, 140 F.2d 500 (C.A. 4); Tobin v. Blue Channel Corp., 198 F.2d 245 (C.A. 4); McComb v. W.E. Wright Co., 168 F.2d 40 (C.A. 6), certiorari denied 335 U.S. 854; Walling v. Crown Overall Mfg. Co., 149 F.2d 152 (C.A. 6); McComb v. Blue Star Auto Stores, 164 F.2d 329 (C.A. 7), certiorari denied 332 U.S. 855; Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310 (C.A. 8), affirming 63 F.Supp. 120, 137 (N.D. Iowa, 1945); Walling v. Mutual Wholesale Food and Supply Co., 141 F.2d 331 (C.A. 8); Calbeck v. Dairyland Creamery Co., 70 S.D. 382, 17 N.W. 2d 262 (Sup. Ct. S.Dak., 1945).

4. In relying upon the Zachry opinion's "rationale" (br. p. 13), defendant (and the court below) have ignored the wholly different factual situation involved in the instant case, contrary to the express admonition in Zachry that "[n]o niceties in phrasing or formula of words *** could dispense with painstaking appraisal of all the variant elements in the different situations presented by successive cases" (362 U.S. at 315). The expansive interpretation and application of Zachry's rationale, which defendant and the court below advance, is, we submit, plainly mistaken, particularly in view of the closely divided (5 to 4) Court even with respect to the factual situations in Zachry and Callus. In contrast to the work of defendant's employees in the instant case, neither Zachry nor Callus (as pointed out in our main brief, pp. 16-17) involved employees working on or near any operating production facility engaged in manufacturing goods for interstate commerce.

The Zachry majority opinion itself emphasizes and confirms the crucial significance of these contrasting factual differences in determining the Act's coverage under the 1949 amended §3(j), and plainly refutes the view, taken by the court below in the instant case, that the 1949 legislative "purpose of narrowing the coverage of the Act" broadly withdraws from its coverage all "employment in local business" (see op. below, B21). Thus the Supreme Court expressly recognized that the Senate Conferees adopted "most" of the pre-1949 Supreme Court decisions (including Roland, of course, see supra, p. 2), and that "[b]oth reports [i.e. House as well as Senate] use as illustrations of coverage which remains unchanged by the amendment, employment in utilities supplying water to producers of goods for commerce" [citing the references we quote from supra, pp. 2-4, fn. 1]. 362 U.S. at 318. In noting that the House and Senate reports manifested some disagreement, the Supreme Court deduced only that "some restraint on coverage was intended by both" (id. at 317, emphasis added). The

court below has plainly misinterpreted this, we submit, as meaning a degree of restraint on coverage far beyond, and contrary to, the expressed legislative intent of both Senate and House Conferees (see pp. 2-4, supra). As the Court of appeals for the First Circuit, in a recent decision subsequent to Zachry, has stated, in reversing a district court's similarly expansive interpretation of Zachry's "some restraint" reference, "We nowhere find any basis for the district court's enlargement of that characterization to 'generous.'" Mitchell v. Dooley Bros., Inc., 286 F.2d 40, at 43, certiorari denied 366 U.S. 911. It is clear beyond doubt that there is no basis whatsoever for the district court's enlargement of that "some restraint" to the extent of overruling the Roland case (supra, pp. 1-3), which is unquestionably more directly pertinent to the factual situation here than is Zachry or Callus.

It may be noted that the continued authoritative vitality of the Roland coverage decision (in addition to the clear legislative approval of it as evidenced by the 1949 legislative history discussed supra, pp. 2-4) appears to have been recognized by this Court. See General Electric v. Porter, 208 F.2d 805, 810, where this Court upheld the amended Act's coverage of employees hired to protect not only the administrative offices of Hanford Atomic Works (a plant engaged in production of goods for commerce) but also the entire surrounding communities of Richland and North Richland, citing Roland for the proposition that "the Act does not require that an employee be employed exclusively in the particular occupation" (208 F.2d at 810). See also Mitchell v. Anderson, 235 F.2d 638 (C.A. 9, 1955), where this Court reaffirmed "the basis for our own opinion" in General Electric, that "basis" being the Court's construction of the 1949 amendment as intended only "to cut off incidental or fringe coverage," i.e. of "activities not directly contributing to the production of goods" (235 F.2d at 641-642).

Exemption Issue

1. Defendant's contention that by pre-1949 standards (except for the "business use" test), its business was within the "retail concept" rests upon confused misconceptions of the controlling judicial authorities, of the 1949 legislative intent, and of the pre-1949 administrative interpretations. And, even apart from its erroneous characterization of this preliminary question of eligibility as "a preliminary factual determination" (br. p. 20, emphasis added), the "factual" evidence on which defendant relies plainly falls far short of meeting the employer's burden of proof that its business is "plainly and unmistakably within their [the exemptions'] terms and spirit" (see authorities cited in our main brief, p. 18).

(a) It is evident that both defendant and the court below have erroneously assumed that this preliminary question may be determined simply by "factual" evidence of the industry's own opinion of the application of the "retail concept." The error of this assumption has been plainly pointed out by the Supreme Court in Kentucky Finance, and by this Court in Goldberg v. Roberts (discussed in our main brief, pp. 18-20). Kentucky Finance explicitly held that the exemption's "retail concept" did not apply to some businesses "regardless of whether they were thought of in the[ir] industry as engaged in 'retail [services]'" (359 U.S. at 294-295, emphasis added). And this Court in Roberts, supra, carefully drew the distinction between determining the "characterization" of the business (which "does involve factual considerations") and determining whether the type of business was "by [its] nature" inside or outside the exemption's retail concept (which is "one of law"), as follows:

> The characterization of appellees' business as a letter shop does involve factual considerations, but once this determination is made, as it was by the trial court, the issue is one of law: Were letter shops, by pre-1949 standards (other than the "consumer use" standard) considered to be retail businesses? (291 F.2d at 534).

The failure of the court below in the instant case to recognize this distinction is evident on the face of its Findings and Conclusions and of its memorandum opinion. Indeed, the court below made no finding of fact or conclusion of law on this "crucial" preliminary question (see Roberts 291 F.2d at 534). It merely found that "The defendant's establishment is recognized as a retail establishment by the defendant and salesmen within the industry" (fdgs. IX and X, B26). Its opinion is similarly deficient referring only to "the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant" as sufficient to establish that defendant's business "was and is considered to be retail within the industry," and reaching the negative conclusion that "the authorities relied on by plaintiff to establish the contention that defendant is 'not within the retail concept' are distinguishable" (B22)--evidently unmindful of the burden of proof on the defendant-employer to establish every element of his claim to exemption.

As a matter of fact, the findings below do not even identify defendant's industry classification, although that was clearly an issue in controversy, defendant claiming it was just an old-fashioned "tin shop" like those which 60-70 years ago were operated in the "basement" of "a retail hardware store" (T68-76) but admittedly with "marked differences" in size and type of product turned out (T75-76), while plaintiffs in rebuttal adduced considerable evidence (including official standard industrial classification publications and telephone listings and advertisements composed by defendant's own manager, as well as the testimony of an expert on marketing) showing defendant's business to be

classified as "General Sheet Metal Work," "Food Processing Equipment," and under "manufacturers, processors and manufacturing industries" (e.g. T109, 122, Pltfs. Ex. 1, A68-69).

In an apparent attempt to remedy the overt deficiencies in the decision below, defendant argues that "the transcript clearly shows that the industry under consideration is the custom sheet metal and building industry" which "has a traditional concept of being retail in nature," citing the transcript references on the early turn-of-the-century "tin shops" in basements of "retail hardware stores," supra. It was solely on the basis of "that background" (see T72-73) that defendant's witnesses expressed the opinion that defendant's establishment (despite its admittedly "marked differences" in size and type of product and "immensely larger" business e.g. with potato processing plants not even "in existence in those days," T75-76) is considered a retail establishment in the industry. And it is solely on the basis of this evidence that defendant, although it concedes that its establishment is not a "hardware store" (br. p.22), contends that its business by nature has a traditional "retail concept."

The issue here is not whether some obsolete business (albeit the forebear in an evolutionary, and revolutionary, development) is by its nature within the "retail concept" contemplated by this exemption; but whether the business as actually and presently conducted by defendant is an enterprise to which the pre-1949 retail standard (minus the strictly "business use" test) applied. The answer to this question (as the Supreme Court and this Court have made clear) is not to be determined by the industry members, but by reference to pre-1949 administrative and judicial rulings to the extent that Congress evidenced its intent to leave them unchanged.

(b) Defendant's contention that the pre-1949 status of its business was not in any of the categories designated as non-retail by administrative

or judicial rulings, and that any such categories claimed to embrace its business are founded solely on the overruled "business use" test, misapprehends the carefully limited scope of that "overruled" test, and erroneously assumes (as did the trial court, B22) that the Roland "retail" rulings were entirely repudiated.

The legislative history makes it unmistakably clear that the "business use" test of Roland which Congress repudiated was confined to "the dicta" in the Roland opinion--"the sweeping ruling" that "no business sale can be classified as a retail sale" and the extension of "the dicta and references in that direction" (95 Cong. Rec. 14931, 12508, 12497), and was "definitely not" intended to change Roland's holding with respect to "the business involved" there "of furnishing machinery and repairing and keeping up electrical machinery for a manufacturing enterprise, * * *" (id. 12497, 12505). As Senator Holland (the chief sponsor of the Amendment in the Senate) pointed out, the amendatory language was simply intended to make it clear "that a business sale does not necessarily have to be a nonretail sale" (95 Cong. Rec. 12495, emphasis added). As an example of the "kind of interpretation" the amendment was intended "to get away from" he gave the following:

> if a housewife goes to a drygoods store to buy towels, that is a retail sale, but if the proprietor of a small hotel located in a small town, or even a village, goes into the same store, is served by the same clerk, buys the same number of towels, paying exactly the same price, under no circumstances can that sale be regarded as a retail sale, because it is for a business use. [95 Cong. Rec. 12494]

Senator Holland further illustrated the effect of his Amendment as eliminating an interpretation which would result in the sale of a bedroom suit for use in a home being classified as retail, but not the sale, by the same store, of "a modest desk for use in [a] law office" (95 Cong. Rec. 12495).

These examples are in marked contrast to defendant's fabrication and sale of industrial equipment, such as receiving tanks holding 5000 pounds of

potatoes, designed for use in processing plants producing for interstate commerce. That there was no intent to exempt such activity from the scope of the Act is confirmed beyond doubt by both Senate and House Conferrees' Reports which explicitly stated that the amended exemptive language does not "change the status * * * of establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such establishment as the in Roland Electric Co. v. Walling (326 U.S. 657) * * *" (Senate Report, 95 Cong. Rec. 14877, emphasis added), and "does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods" (House Report, 95 Cong. Rec. 14932). See also quoatations from legislative debates and reports contained in our main brief, pp. 22-23.[4/]

4/ The explicit language of §13(a)(3) further confirms beyond doubt the legislative intent not to exempt sales and services to manufacturers of goods for commerce. That section provided a separate exemption for laundries and linen supply houses if 75% of "such establishment's dollar volume of sales of * * * services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business." In explaining the purpose of this exemption Senator Holland said it was to remedy "the same distinction under the present law," which he proposed to remedy by amending §13(a)(2)--i.e., the distinction "between work done for families and that done for the little village barbershop, beauty shop, doctor's office, dentist's office, or for any of the other purely local establishments" (95 Cong. Rec. 12503). But he emphatically disavowed any intent to exempt a laundry whose "business involved the serving of interstate carriers," indeed he "invite[d] particular attention at this time to the fact that laundries which have more than 25 percent of their business in the servicing of the Pullman Co., bus lines, or steamship lines, automatically lose their exemption," stating unequivocally that "there is no thought at all, under this amendment of exempting such a business as that,"--that there had been "a good faith effort to extend in no jot or tittle" into such interstate business--and that "large laundries, whose customers consist primarily of interstate businesses * * * will not be exempt" (ibid., emphasis added).

That this was simply a reflection of the legislative intent of the §13(a)(2) amendment was explicitly made clear by Senator Holland's explanation that the §13(a)(3) exemption was designed to give laundries and linen supply houses "the same relief from the Roland decision as the other retail and service establishments" (ibid., emphasis added).

The legislative history thus leaves no room for doubt that the Court below was mistaken in ruling that "the retail concept described in Roland" was entirely "repudiated by the 1949 amendment" (A22). Contrary to this ruling below, Roland's "retail concept," to the extent that it relates specifically to the type of business most closely comparable to defendant's, i.e. supplying "materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce" (326 U.S. at 668, 677-678), was definitely approved, and was not encompassed in the overruled "business use test." The Roland opinion demonstrates that the pre-1949 non-retail status of this kind of business was founded on considerations other than the repudiated "business use test"--i.e. it was founded on the basic original legislative purpose to exempt "only such * * * establishments as are comparable to the local merchant * * * who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach" (326 U.S. at 666, emphasis added), "the origin of this clause, §13(a)(2), [having] had nothing to do with establishments 'producing goods for [interstate] commerce'" (id. at 667), for "although they [Roland's sales and services to producers for commerce] were to be used and probably ultimately 'consumed' in the hand's of [Roland's] customers, these motors remained actively in use in the production of the 'flow of goods in commerce' [and] it is to this great field of the production of goods for interstate commerce that the Act is directed" (id. at 678).

It is by these same standards--and not simply by the overruled "business use test"--that the pre-1949 non-retail status was ascribed to establishments engaged in fabricating, repairing, reconditioning, or otherwise servicing, industrial processing machinery, equipment and tools, used in the production of goods for interstate commerce. Obviously any establishment

selling or servicing production machinery or equipment for use in manufacturing goods for interstate commerce is also selling or servicing for "business use" in the generic sense. The legislative history of the 1949 Amendments, as well as plain common sense, conclusively establish that Congress did not repudiate the "business use test" in this generic sense.

(c) Defendant's attempt to deny its pre-1949 non-retail status on the ground that it cannot "find any interpretative bulletin or manual wherein the 'custom sheet metal industry' has been determined by the administrator or the court" (br., p. 23), is, we submit, patently without substance, in view of the close analogy of defendant's business to those specifically mentioned in the pre-1949 administrative bulletins, as well as to the business judicially held non-retail in Roland (in 1946)--an analogy "so striking as to be obvious." Cf. Mitchell v. Sorvas, 294 F.2d 841, at 846 (C.A. 3). As pointed out in Sorvas, "clearly the Administrator was not attempting to name every form of * * * business * * *. He was giving illustrations of categories into which this case fits" (ibid.).

Nor were the courts, prior to the 1949 Amendments, deterred from recognizing that the "typical" illustrations mentioned in the administrative bulletin were equally applicable to similar businesses not specifically identified by name. Thus, although renting of building space was not specifically included in the bulletin's list of non-retail service businesses (1942 W.H. Manual, pp. 334-335, §29), the Supreme Court had no hesitation in concluding that this was not the type of service contemplated by the retail exemption. Kirschbaum v. Walling, 316 U.S. 517, 526 (1942). Similarly, Roland's business of installing and repairing electrical wiring, motors and generators was not specifically listed. The Supreme Court, in holding that Roland's business was not retail, relied upon the Administrator's classification as non-retail of "many types of sales

closely comparable to" Roland's sales of "motors, generators and similar equipment to commercial and industrial customers for their use in producing goods for interstate commerce," referring specifically to §29 in which were listed "machine shops and foundries, establishments engaged in sharpening and reconditioning industrial tools, in resistance welding, in armature rewinding * * * companies engaged in repair of business machines, ***." and to the footnote to §11 of the bulletin (326 U.S. at 677), which included among the "types of goods" having "only an industrial or business market" (explicitly noting that they were "merely examples and do not comprise an exhaustive enumeration") "conveyor and hoisting machinery * * * foundry equipment * * * machine tools, mechanical rubber goods (such as belting, packing, gaskets and recoil pads), mill and mine supplies * * * textile machinery and equipment etc." (1942 Wage Hour Manual, p. 329, fn. 6). Manifestly, defendant's fabrication or maintenance and repair of metal tanks, conveyors, buckets, hoods, hoppers, hoisting equipment etc. for food processing plants (which is equipment with a "definitely" limited market, admittedly, T54), are as "closely comparable" to the types of sales and services classified as non-retail in the pre-1949 administrative bulletin as were Roland's sales and services. 5/

5/ In Sorvas, supra, the Third Circuit made short shrift of the employer's contention (like defendant's here) that the pre-1949 administrative or judicial rulings had not specified the "shopping service" business as non-retail. Noting that, although "prior to 1949 the Administrator had not specifically named 'shopping service' establishments as excluded from the 13(a)(2) exemption," he had, however, listed such "service type businesses" as "'supplying business, financial and statistical reporting data; * * * adjustment and credit bureaus and collection agencies; credit rating agencies; * * * [and] employment agencies,'" which were sufficiently analogous illustrations of categories to fit a "shopping service" establishment (294 F.2d at 846). Accord: Willmark Service System v. Wirtz, 317 F.2d 486, certiorari denied 375 U.S. 897.

In the light of the clearly expressed legislative intent concerning the non-retail status of Roland's sales of "industrial goods and services to manufacturers engaged in the production of goods for interstate commerce," defendant's attempt to deny its pre-1949 non-retail status is, we submit, plainly untenable. As noted above (supra, p. 5) the Roland Company sought to identify its business with the obsolete "Village Blacksmith Shop," just as defendant here attempts to identify its business with the obsolete "tin shop" in a hardware store. In short, defendant's business here is as closely comparable to a business whose non-retail status was settled by a pre-1949 judicial (as well as administrative) ruling (Roland), as was the "letter shop" which this Court held to be outside the retail concept "by pre-1949 standards (other than the 'consumer use' standard)." Roberts, supra, p. 11.

(d) Defendant's reliance on the Taylor Fertilizer and Boisseau decisions of the Fifth Circuit (br., pp. 35-36) serves only to confirm the lack of substance in its claim to exemption. For, as pointed out by the Third Circuit in Sorvas (294 F.2d at 848), both of these decisions have clearly been discredited and stripped of precedent value. Both rested on the mistaken assumption that the 1949 Amendment represented a general expansion of the scope of this exemption--an assumption decisively repudiated by the Supreme Court in the Kentucky Finance and Kanowsky decisions. As pointed out by the Supreme Court in the latter case (361 U.S. at 391-392): "This Court had occasion at the last Term to point out that the 1949 revision does not represent a general broadening of the exemptions contained in §13 [citing Kentucky Finance, 359 U.S. 290, at 294]." The Courts of Appeals in both of these cases --Kentucky Finance, 254 F.2d 8, at 10 (C.A. 6) and Kanowsky, 250 F.2d 47, at 49 (C.A. 5)--had relied heavily on the Boisseau and Taylor decisions, only to

be reversed by the Supreme Court. It may be noted, that the district court in Mitchell v. Roberts, which had relied solely on Boisseau as controlling because Boisseau too had involved a "letter shop" (179 F.Supp. 247), was reversed by this Court (291 F.2d 532).[6/]

Respectfully submitted.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

6/ Lesser v. Sertner's, the other decision on which defendant relies (br., pp. 28-29)--in addition to being a pre-1949 decision which itself rested on "the type of customer" test--is patently inapposite factually to defendant's business. It suffices to point out that the decision was predicated on the fact that "about 83 percent of its business came from private residences" (166 F.2d at 473-474), i.e. "ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." Cf. Roland, supra, pp. 14-15.